Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1903

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DAVID MERVIN HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court erred in failing to enforce the plea bargain between David Mervin Hoffman and the United States of America, and accordingly, failing to dismiss the Order of contempt?

2. Whether the Court erred in finding that the grant of immunity and the reach of the Fifth Amendment provided sufficient protection to David Mervin Hoffman when a foreign country was involved?

3. Whether the Court erred in finding that subsequent incarceration for the Order of contempt is "dead time" for a person presently confined to a federal prison?

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Comes now, the Petitioner, David Mervin Hoffman, and respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

REPORT OF OPINIONS BELOW

The United States District Court for the District of Montana, Great Falls Division, issued its Order In Re Contempt on January 26, 1987. In the Order, the Court first made findings of fact, and based upon those findings of fact, concluded as a matter of law that the reasons given for Mr. Hoffman's refusal to testify were not just cause, and further that the plea bargain agreement between Mr. Hoffman and the United States indicated that Mr. Hoffman was aware that any plea bargain was not binding upon the District Court. From the findings of fact and conclusions of law, the Court ordered that Mr. Hoffman be found in contempt; that Mr. Hoffman be incarcerated until such time as he could appear before the grand jury and answer such questions as would be propounded of him; and further that the computation of time spent in custody pursuant to this Order and its effect upon Mr. Hoffman's prison sentence

shall be computated by the Bureau of Prisons.

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court in an unpublished Memorandum dated February 27, 1987. The Court held that it was not reasonable for Mr. Hoffman to assume as part of the plea agreement that the government had impliedly promised that he would not be called to testify before the grand jury. Further, the Court held that Mr. Hoffman did not have just cause to refuse to testify on the grounds that his testimony might incriminate him under the laws of Canada. Finally, the Court held that a civil contempt sentence may be imposed upon a witness who is serving a criminal sentence, thereby suspending service of the criminal sentence during the period of the contempt confinement.

JURISDICTION

The Memorandum of the United States Court of Appeals for the Ninth Circuit was filed on February 27, 1987. This Petition for Certiorari, which is mailed on April 28, 1987, is timely as required by Supreme Court Rule 20.1.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the Land or Naval Forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

United States Constitution, Ninth Amendment.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Tenth Amendment.

The powers not delegated to the United States by

the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

18 U.S.C. Sec. 3568.

(The pertinent text set forth in the Appendix.)

28 U.S.C. Sec. 1826.

(The pertinent text set forth in the Appendix.)

STATEMENT OF THE CASE

A. Statement of the Facts

The Petitioner, David Mervin Hoffman, was charged by an indictment in the District of Montana, Billings Division, under number CR 86-1-BLG with the crime of possession with intent to distribute marijuana, a Schedule I controlled substance, in violation of 21 U.S.C.A. 841(a)(1). At that time, he was represented by Christopher P. Thimsen, Esq., of Billings, Montana, and during the course of said proceedings, plea bargain discussions were entered into between the United States Attorney and the attorney for the defendant. On February 19, 1986, the United States Attorney called by phone to the attorney for the defendant and advised that if Deane (David Mervin Hoffman) pleads guilty

there would be no recommendation with respect to sentencing, but that any time imposed would be concurrent with the Canadian sentence. As an alternative or option, he was advised that if he wanted to testify against others, then the government may make a recommendation for less time. This discussion was reduced to writing by memorandum at the time the discussions were held by Mr. Thimsen as follows:

> "2-19-86.
> "Seykora called - if Deane pleads guilty - no recommendation re sentence - but any time will be concurrent w/Canadian sentence.
>
> "If he wants to rat then, they may make a recommendation for less time.
> CPT"

Subsequently, the defendant elected the first alternative to plead guilty without recommendation, with the clear understanding that he would not, under those circumstances, be required to testify against others. This formed the basis, and the inducement, upon which the defendant entered a plea on May 9, 1986.

In addition, the defendant, David Mervin Hoffman, to insure that he would have no further problems in the United States, advised the Court that he wished to serve

his sentence in Canada and neither the Court nor the United States had any objection to this provision and it was included in the Judgment and Commitment Order.

Thereafter, the defendant was required to appear before the grand jury at Great Falls, Montana, on or about June 17, 1986 (these grand jury proceedings were handled by the same United States Attorney that entered into the agreement with the defense counsel so that he was fully knowledgeable), at which time he refused to testify upon the grounds that it might tend to incriminate him, particularly for the reasons that the protection was not as broad as that provided by the Fifth Amendment because this involved a case or cases now pending in Canada and the order would not have extra-territorial effect. The scope and breadth of the Fifth Amendment as it applies to foreign jurisdictions was a subject of doubt, discussion, and controversy. As a result of these discussions with the United States Attorney, Mr. Hoffman did not actually appear before the grand jury.

Thereafter, a habeas corpus proceeding was instituted to require the defendant to appear before the

grand jury at Great Falls, Montana, on November 18, 1986, and there to give testimony on behalf of the United States government. The subpoena was duly issued and delivered to the defendant, and a copy of the writ of habeas corpus was served. In addition, Mr. Hoffman was served with a letter dated November 18, 1986, executed by Jeffrey D. Thomas as agent for the Attorney General of the Dominion of Canada advising that the Dominion of Canada "does not intend to prosecute for any crimes upon which prosecution could be based as a result of your testimony before the United States grand jury".

The defendant appeared before the grand jury at Great Falls, Montana, on November 18, 1986, at which time in response to questions asked him he respectfully declined to testify at that time. Mr. Hoffman set forth his reasons for not testifying, and they were, in part, as follows:

1. No legitimate purpose has been given to compel my testimony under a grant of immunity.

2. Such information as obtained may be used against me in proceedings outside the continental

United States and in a foreign jurisdiction.

3. There is a conflict of laws as to whether the Fifth Amendment does or does not protect against self-incrimination under foreign law.

4. There is a joint participation between the Canadian government and the United States government as to these proceedings which may affect any grant of immunity.

5. Comity in criminal cases between nations is simply not permitted, and the Court would have to determine whether the law is sufficient to protect the witness' interest.

6. There was danger to himself and his family which cannot be minimized.

7. Finally, the basis of the judgment of conviction and my entering into a plea bargain agreement with the United States government was implicitly that I would not have to testify against others and could go to Canada without further problems in the United States. This was a basic and material part of my decision to enter into a plea and should be respected by the Court, and the United States government should be obligated to

carry out this agreement.

Based upon the refusal of the defendant to testify before the grand jury, he was brought before the Court for the purpose of holding him in contempt. The Court granted time within which the government and defense counsel could present their position on these issues and set the matter for hearing on December 17, 1986, for further proceedings. Despite a motion to quash, the Court held the defendant in contempt by its Order dated January 26, 1987, on which this appeal is taken.

B. Jurisdiction in Court of First Instance

The basis for federal jurisdiction in the court of first instance, the United States District Court for the District of Montana, Great Falls Division, is 28 U.S.C. Sec. 1826.

ARGUMENT

Issue #1. Whether the Court erred in failing to enforce the plea bargain agreement between David Mervin Hoffman and the United States of America, and accordingly, failing to dismiss the Order of contempt?

Central to the decision of Mr. Hoffman to refuse to testify is the plea bargain agreement that was entered into between the parties or understood by the parties when he entered his plea before Judge Battin's Court on May 9, 1986. He was given an alternative: If he pleads guilty, there will be no recommendation as to sentence; if he wants to testify as to others, then they may make a recommendation for less time in his sentence. Mr. Hoffman did not wish to testify and wanted to return to Canada, being a Canadian citizen, and thus selected the former choice for which he received the maximum sentence as provided by law. In this respect, it was a heavy price to pay for not testifying against others, but it was a decision made and understood by all parties.

The government, however, after securing the maximum sentence under his agreement to plead without testifying as to others, thereafter subpoenaed him to appear before a grand jury to in fact testify under a grant of immunity having to do with cases in the United States and in the foreign jurisdiction of Canada. This, of course, is contrary to the understanding and the

agreement that Mr. Hoffman had with the government. It is obvious fact that if he knew that he would be required to testify in any event, then, of course, he would simply accept the latter alternative and receive a lesser sentence. In our view, the government cannot have it both ways. We respectfully submit that "a deal is a deal", and that the government and all parties must abide by and carry out the literal terms of the agreement, and this is supportable by law.

A quiet word should be stated with respect to the factual circumstances in this case. They can be detailed as follows:

1. The testimony of Mr. Hoffman is clear and concise on this issue, and there is no contrary evidence as to his understanding of the agreement with the United States Attorney. (In this respect, it is not a disputed fact case.)

2. There is a memorandum that was submitted in evidence in this case which supports Mr. Hoffman's understanding of the options available to him. (This has been produced in the statement of facts and appears in Appendix.)

3. The affidavit of Mr. Thimsen, the attorney, confirms.

4. The United States Attorney who was involved in this agreement or understanding, did not assert facts to the contrary. (It was interesting to notice that he used the word "rat" in his summation in the same way as it appeared in the note by Mr. Thimsen. See Page 34 of Transcript of Proceedings of December 17, 1986, in Appendix.)

5. The Judge found that there was in fact an option that the defendant had. In short, he can testify and receive a lesser sentence or recommendation, or not testify and take his chances for a maximum sentence. (Which he received.)

6. It is almost conclusive and uncontradicted that the defendant wanted to "get out from under the clutches of the United States government", and this appears in the Judgment and Commitment in the drug case, for which he pleaded guilty. Obviously he wanted to insure that the government would keep its bargain and not require him to testify.

7. The Judge was under the impression that the

determination of whether the Court accepted the agreement or not was controlling. This is legal error in our view because the applicable law is that it is the agreement between the parties that is to be enforced and which provides the inducement for the entry of plea, and not the Court's decision as to whether he will consider it or not.

One comment may be appropriate here. This is an unusual case in that the defendant is seeking simply to enforce the agreement and not to set aside the plea. He carried out his part of the bargain by subjecting himself to maximum punishment for the crime to which he pleaded guilty and he must suffer the consequences. He is not seeking to set aside the plea; simply to enforce the agreement.

The leading case, of course, is Santobello v. New York, 404 U.S. 251, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971). This case, of course, is well known to the Court, but statements made in that case have relevance.

1. The Court in that case advised defense counsel that the statements of the prosecutor did not influence him in any way as to the sentence to be imposed and

that "it doesn't make a particle of difference what the District Attorney says he will do or what he will not do". In other words, the decision of the Court, even if he declares that he is not bound by it as in this case or that it is not relevant as in the Santobello case, the issue is simply whether the agreement should be enforced.

2. The Court stated that the disposition of criminal charges between the prosecutor and the accused is an essential component of the administration of justice and is to be encouraged; and where a guilty plea rests in significant degree on an understanding between the parties so that it could be said to be an inducement for an entry of plea the agreement could be enforced or other appropriate relief given. In other words, it depends upon the understanding of the parties, which would influence the defendant in entering a plea. In the case at bar, these circumstances are uncontradicted.

This case, of course, has found approval everywhere, but specifically, we direct the Court's attention to the following cases. United States v. Garcia, 519 F.2d 1343 (9th Cir. 1975); United States v.

Carrillo, 709 F.2d 35 (9th Cir. 1983); United States v. Krasn, 614 F.2d 1229 (9th Cir. 1980); United States v. Sutton, 794 F.2d 1415 (9th Cir. 1986); Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986); United States v. Kamer, 781 F.2d 1380 (9th Cir. 1986).

Conclusion as to Issue #1

The factual circumstances with respect to understanding of the parties is not challenged here. The testimony is clear and unrefuted as to what the circumstances were. The defendant could "rat" on others and have the prospect of a reduced sentence or could "keep his mouth shut" and not testify and subject himself to the maximum sentence (which he received). This inducement not to testify and take his medicine was clearly in the minds of all concerned. If he had the slightest notion that the government would thereafter "compel" him to testify, there would be no reason for him to subject himself to the maximum sentence.

Issue #2. Whether the Court erred in finding that the grant of immunity and the reach of the Fifth Amendment provided sufficient protection to David

Mervin Hoffman when a foreign country is involved.

For many years, the right under the Fifth Amendment to the United States Constitution not to be a witness against yourself and that you could "remain mute" was the law of the land. The Fifth Amendment and its protection was understandable and very clear. There was, however, the right to waive the benefits of the Fifth Amendment if the waiver was informed and intelligent and knowingly made. Thus, a witness could contract with the prosecution that he would waive his Fifth Amendment rights if he would not be prosecuted for the crime for which he might incriminate himself. This was a fully accepted principle.

Subsequently, even without regard to "the balancing test", the Supreme Court ruled that the government must have the power to compel testimony to secure information necessary for effective law enforcement. If there was a modification or reduction in the effectiveness of the Fifth Amendment, a "watering down" of the constitutional rights, if you will, still the need for effective law enforcement carried the day. It is clear that if this position was carried to its logical conclusion,

then all constitutional rights are simply subordinate to effective law enforcement. In this respect, the inalienable rights set forth in the Bill of Rights became subject to overriding government control. This ruling was set forth in Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed.2d 678, 84 S.Ct. 1594 (1964).

Thereafter, the usual rule in the field of immunity was that where a person was now compelled to give up his Fifth Amendment rights under a grant of governmental immunity, he could not be prosecuted for any conduct about which he had testified. This was the ordinary "transactional immunity" which has been set forth in New Jersey v. Portash, 440 U.S. 450, 59 L.Ed.2d 501, 99 S.Ct. 1292 (1979). It became apparent, however, that prosecutors were reluctant to grant such extensive immunity to a witness. But this was not appropriate for the prosecution, and the Organized Crime Control Act of 1970 was passed in which Congress sought to make the grant of immunity more useful for law enforcement. The purpose was to give to the prosecution the necessary legal tools to strengthen the evidence gathering process and to insure that the evidence will then be

available and addressable at trial (116 Cong.Rec. 35200, Statement of Rep. St. Germain). Obviously, Congress now interposed its rules by repealing the authority for transactional immunity and providing for the less comprehensive use immunity and derivative use immunity authorized by Sec. 6002 and 6003. The need for better law enforcement tools and the denigration of the Fifth Amendment was apparent, and this new statute was upheld in Kastigar v. United States, 406 U.S. 442, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972). In that respect, the rationalization was and is that any grant of immunity must be coextensive with the privilege and that the statute provides a "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom". This bring us, of course, to the present day and the use of the immunity statutes.

Adding to the confusion as to the application, scope and extent of the use immunity statute, we now have the intervention of possible proceedings in a foreign jurisdiction and that is the issue, at long last, that is presented here.

Courts have attempted to resolve these issues so the testimony could be available in a foreign jurisdiction against a defendant where testimony before the grand jury would not be available and his rights would be fully protected. One of the means to try and accomplish this is the suggestion that the Federal Rules of Criminal Procedure, Rule 6(e), pre-served the secrecy of the grand jury and there was no real and substantial danger of foreign prosecution. There is a conflict in the Circuits on this issue. See United States v. Lemieux, 597 F.2d 1166 (9th Cir. 1979), and United States v. Under-Seal, 794 F.2d 920 (4th Cir. 1986). It is precisely this conflict among the Circuits that must be resolved, and which forms the primary basis upon which this Petition is submitted.

In the case at bar, there seems to be no argument or issue that the Fifth Amendment and the protections accorded under that constitutional provision extends no further than the boundaries of the United States and is not binding upon the Dominion of Canada. See, in this respect, United States v. Maher, 645 F.2d 780 (9th Cir. 1981); United States v. Rose, 570 F.2d 1358 (9th Cir.

1978); Stonehill v. United States, 485 F.2d 738 (9th Cir. 1968). There is clearly no protection, and this should be established fact so that the scope and reach of the Fifth Amendment is not consistent with the purposes of the law in securing such testimony, that being a necessary requirement.

The issue is also advanced as to how the United States Court in dealing with this issue can determine or decide whether there is sufficient protection in Canada for the defendant and whether the reach of the Fifth Amendment will be accorded in Canada. In Her Majesty, Queen in Right v. Gilberton, 597 F.2d 1161 (9th Cir. 1979), the United States District Court would not accept a judgment from a foreign country under any sort of full faith and credit considerations. In that case, the Court said:

> "Generally, judgments from a foreign country are recognized by the courts of this country when the general principles of comity are satisfied. Two often-stated exceptions to comity occur when the judgment is based upon either the tax (the revenue rule) or penal laws of the foreign country. (Citing cases)."

That case additionally says:

> "This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass it neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

What we glean from this case is the following:

1. The United States Courts cannot recognize the force and effect of the criminal law in a foreign jurisdiction under comity.

2. If judgments cannot be accepted, then any proceedings before judgment would have ever a lesser role of acceptance in the United States of those foreign proceedings.

3. To pass upon or to rule upon the provisions for the public order of another state should be beyond the

powers of the Court. This is exactly what the Court is being called upon to do in the instant case: to determine the extent and scope of the Canadian procedures and whether in the Court's view it would adequately protect the defendant here.

This, it is submitted, extends the United States law applicable only in the United States far beyond that contemplated by Congress or that contemplated by the scope and reach of the Fifth Amendment as understood when compelled testimony was required by Congress.

One final issue requires comment. The cooperation and joint venture between the federal government and the Canadian authorities is apparent. Representatives of Her Majesty's government have been present to testify. We know of our own knowledge of communications by the United States Attorney with attorneys for the Canadian government in connection with this case, and it is obvious fact that exporting from the United States or importing from the United States are so inextricably bound up in factual circumstances that they cannot be separated as a matter of fact. See United States v. Under-Seal, 794 F.2d 920 (4th Cir. 1986);

United States v. Maher, cited supra, United States v. Rose, cited supra; and Stonehill v. United States, cited supra.

Therefore, if the United States government cannot give and is not capable of giving the full scope and reach of the Fifth Amendment to a witness, he should not be obligated to testify. In this respect, the letter from the Canadian attorney says they will not prosecute for any binding action or information received from his testimony before a United States grand jury but that does not mean that he will not be required to testify in the United States or in Canada, and that when he does in fact testify, that that testimony can be used against him in either sovereign country.

Conclusion as to Issue #2

With respect to the law of immunity, there are certain issues for consideration by the Court which are seriously proffered.

1. The act of Congress in granting immunity cannot diminish or "water down" the benefits of our Constitution under the Fifth Amendment. We simply cannot have a "legislative equivalence" rule where Congress

states this is as good as the protection afforded by the Constitution. At least that is the way it has been since 1803.

2. The problem is to determine whether the scope and reach of the Fifth Amendment is satisfied where foreign jurisdictions are involved. If, as they say in Zicarelli v. Investigation Commission, 406 U.S. 472, 32 L.Ed.2d 234, 92 S.Ct. 1670, there is no real or substantial fear that the defendant would be exposed to prosecution outside of the United States, the immunity applies.

3. A joint venture between Canada and the United States is apparent from the testimony in this case and from the documents that have been submitted. As shown in the cases cited to the Court, this changes the rule as to immunity where there is a joint undertaking.

4. United States v. Under-Seal also points out that the Federal Rules of Criminal Procedure 6(e) does not satisfactorily solve the problem of secrecy.

We think consideration of these issues will demonstrate the merit of our position and that good cause is shown for our views.

Issue #3. Whether the Court erred in finding that subsequent incarceration for the Order of contempt is "dead time" for a person presently confined to a federal prison?

The cases seem to hold that incarceration as a result of civil contempt is in fact dead time and "interrupts" the actual sentence being served. The cases in support of this proposition are as follows: Application of U.S. Senate Permanent Subcommittee on Investigation, 655 F.2d 1232; In re Garmon, 572 F.2d 1373 (Calif.); Martin v. United States, 517 F.2d 906; United States v. Chacon, 663 F.2d 495.

The specific statutory language reads as follows:

> "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for srvice of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed . . . No sentence shall prescribe any other method of computing the term." (18 U.S.C.A. 3568) (Emphasis supplied.)

It is, however, a matter of statutory construction to

determine whether a sentence imposed in a criminal case can be interrupted for any reason without a statutory exception or without reserving the right for another court in a civil proceedings to change the sentence in a criminal case. We assume that in a civil case there is no jurisdiction to affect or tamper with a sentence imposed in a different case and in a different jurisdiction.

The argument that has been presented is simply that there would be no way to "coerce" an incarcerated defendant and force him to testify, the Fifth Amendment notwithstanding. Upon this basis, an exception is "breathed" into the law.

We assume that matters of statutory construction are equally applied both as it concerns the government and as it concerns any "criminal" seeking to avail himself of the same standards of statutory construction. It is interesting to read United States v. Rojas-Contreraz, 474 U.S. ___, 88 L.Ed.2d 537, 106 S.Ct. ___, holding that under the plain language of the statute the restarting of the 30 day pretrial prepar-ation period under a superseding indictment is not required. Of

substantial interest, furthermore, is T.V.A. v. Hill, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 2279 (1978). This was the "snail darter" case where the Court was confronted with the explicit language of a statute that, in application, produced a curious result. It was noted that nothing prohibited Congress from passing unwise legislation, and we have upheld the statute as Congress has written it. Granting relief from a statutory provision is a function of the legis-lative branch of government and could not have been tailored by the Courts, or so it was said in that case.

This was recently reaffirmed in Federal Reserve Board v. Dimension Financial, 474 U.S. ____, 88 L.Ed.2d 691, 106 S.Ct. _____. There the Court observed the "plain purpose of the legislation". It quotes with approval T.V.A. v. Hill. We also have a rule of construction that the Court may not add to a statute or may not subtract or omit provisions from the statutory language. There is no cause to grant exceptions in the law because it is a legislative function. The Courts are courts of last resort, of course, but are not designed to make law.

Conclusion as to Issue #3

It is an interesting commentary on our law that where the statute is explicit as to the sentence of imprisonment of any person that by judicial construction a civil contempt statute interrupts the sentence and is contrary to the statutory provisions. It is interesting to observe that this is simply a "rule of necessity" and that we add to the statute an exception which does not appear in the Code. If Congress wanted to make an exception, why didn't they say so in clear and precise terms? However, Congress did not. The reality of this "statutory construction" is to simply coerce a person into testifying and that is all it is: coercion, and that is the reality.

THE COURT'S DECISION

On February 27, 1987, the Ninth Circuit Court of Appeals affirmed the decision of the District Court of Montana. We address our concern with that decision in this section of the petition.

The Court held:

> "When a guilty plea rests in any significant degree upon a promise or agreement of the Government such promise must be fulfilled.

United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984)."

We agree. The testimony is simply uncontradicted that whether he would testify against others was a material and significant part of his decision to plead in this case and subject himself to the maximum punishment. This can scarcely be denied.

The Court held:

"In determining whether a plea agreement has been broken, the Court must look to what was reasonably understood by the defendant when he entered his plea."

We agree. The evidence is uncontradicted that he understood he would not be required to testify against others or give any statement to that effect. He says so, his attorney confirms, and the United States Attorney registered no denial. This was not the fact that, we submit, was the state of the clear record.

The Court, however, held:

"It was not reasonable for Hoffman to assume that the Government had impliedly promised that he would not be called to testify before the grand jury. The record reveals no representations by the Government that Hoffman would not be subpoenaed to testify."

We disagree. The record reveals:

1. The understanding of Hoffman and his attorney.

2. That in the judgment he would be permitted to return to Canada as requested by Hoffman.

3. The same United States Attorney handled the agreement and the grand jury — no mistake here.

4. It would be illogical to enter a plea, as he did, with the understanding he would, thereafter, have to testify anyway. Why not take the lesser sentence?

5. Reliance on the slender reed in the decision that a difference in the forum is significant is misplaced. The deal was, "If you want to keep your mouth shut, O.K., but the maximum sentence awaits you." That is what he accepted. It is a matter of common sense. "Furthermore, we agree to send you to Canada." What more is required as to what the defendant and his attorney understood?

6. If he had been informed he would have to testify <u>anyway</u>, it would have affected his decision. That, too, is common sense. In this light, it was not an informed and intelligent decision as seems to be required, if there was an unspoken caveat that the government would thereafter rely on the grand jury. It

is not fair.

We believe that part of the decision to be erroneous.

The Court further held the possibility of the use of the grand jury testimony by a foreign jurisdiction does not violate a witness' privilege against self-incrimination.

Hufstedler in his concurring opinion in In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979) is favorable to our view expressed in this petition.

It is the law of the forum which determines the scope and reach of constitutional protections. It is the cooperative effort (joint) of the United States and Canada which distinguishes this case. It is the Federal Rule of Criminal Procedure 6(e) which cannot fore-close the imparting of information that is relevant.

In sum, the Fifth Amendment is an idle and useless right that does not protect a prosecution or testimony if the witness is required to testify in Canada in an open forum. It jeopardizes future prosecutions in the United States for which there is, apparently, no protection.

This is especially true in this case where export-import issues are involved and inextricably bound together.

We submit the decision does not, by its ruling, protect Hoffman and his constitutional rights. It is not a remote possibility that he will not or will go to Canada. It is actual fact. (Compare Lemieux and Mexico as to factual distinctions.)

As to the Court's ruling on "dead time", our petition suggests Supreme Court of the United States cases, which do not permit "judicial legislation". We take the statutes as we find them and do not add or interpret that which does not appear. This is a legislative function.

CONCLUSION

For the reasons stated and the authorities cited, petitioner prays that this Court grant this petition for a writ of certiorari.

DATED this 28th day of April, 1987.

MOSES LAW FIRM
P. O. Box 2533
Billings, MT 59103-2533

By Charles F. Moses
Charles F. Moses
ATTORNEY FOR PETITIONER

FILING AND SERVICE VERIFICATION

STATE OF MONTANA)
: ss.
County of Yellowstone)

CHARLES F. MOSES, of legal age, being first duly sworn, on his oath, deposes and says that he is the attorney for petitioner herein, and that he personally has deposited 40 copies of this petition in the United States Post Office in Billings, Montana, first class postage prepaid and affixed, and properly addressed to the Clerk of this Court, on the 28th day of April, 1987, which is timely as within 60 days of this date of the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit dated February 27, 1987.

Affiant further states that this petition was at such time and place served by mail on the respondent

United States of America by mailing three copies thereof to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and three copies thereof to:

Byron H. Dunbar
United States Attorney
Federal Building
Billings, MT 59101
Attention James E. Seykora
Assistant United States Attorney

Charles F. Moses

Charles F. Moses

Subscribed and sworn to before me this 28th day of April, 1987.

Notary Public for the State of Montana
Residing at Billings, Montana
My Commission expires 4/9/1988

APPENDIX

Memorandum of Ninth Circuit Court of Appeals - February 27, 1987 ..... A

Order in re Contempt - January 26, 1987 ..... B

Defendant's Exhibit #1 - Indictment C

Defendant's Exhibit #2 - Note of Attorney Thimsen ..... D

Defendant's Exhibit #3 - Affidavit of Attorney Thimsen ..... E

Defendant's Exhibit #4 - Judgment dated May 12, 1986 ..... F

Transcript of Proceedings of April 4, 1986, pages 5, 6, 7 ..... G

Transcript of Proceedings of December 17, 1986, pages 20-23 ..... H

Transcript of Proceedings of December 17, 1986, page 34 I

Transcript of Proceedings of December 17, 1986, pages 38, 39 ..... J

18 U.S.C. Sec. 3568 ..... K

28 U.S.C. Sec. 1826 L

NOT FOR PUBLICATION

FILED Feb 27, 1987
Cathy A. Catterson, Clerk,
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDING DAVID MERVIN HOFFMAN, Witness-Appellant v. UNITED STATES OF AMERICA, Appellee.	)	No. 87-3002 DC# GJ-1-GF Montana MEMORANDUM*

Submitted February 24, 1987**
Decided February 27, 1987

Appeal from the United States District Court
For the District of Montana
Hon. Paul G. Hatfield, U.S. District Judge, Presiding

Before TANG, PREGERSON and O'SCANNLAIN, Circuit Judges

Hoffman appeals the district court's judgment holding him in civil contempt for refusing to testify before the grand jury.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 3(f).

A grand jury witness may be held in civil contempt if he refuses without just cause to testify. 28 U.S.C. Sec. 1826. When a guilty plea rests in any significant degree upon a promise or agreement of the government, such promise must be fulfilled. United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984). In determining whether a plea agreement has been broken, the court must look to what was reasonably understood by the defendant when he entered his guilty plea. Id.

It was not reasonable for Hoffman to assume that the government had impliedly promised that he would not be called to testify before the grand jury. The record reveals no representations by the government that Hoffman would not be subpoenaed to testify. The district court correctly concluded that the plea agreement did not preclude the government from subpoenaing Hoffman to testify.

Nor does Hoffman have just cause to refuse to testify on the ground that his testimony might incriminate him under the laws of Canada. This court has held that the possibility of the use of grand jury testimony by a foreign jurisdiction does not violate a witness' privilege

against self-incrimination. In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166, 1167 (9th Cir. 1979); In re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974).

Finally, this court has held that a civil contempt sentence may be imposed upon a witness who is serving a criminal sentence, thereby suspending service of the criminal sentence during the period of the contempt confinement. In re Grand Jury Proceedings (Garmon), 572 F.2d 1373, 1376 (9th Cir. 1978).

AFFIRMED.

APPENDIX A

JAMES E. SEYKORA
Assistant U.S. Attorney
P. O. Box 1478
Billings, MT 59103
Telephone: 657-6101

Attorney for United States

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

IN RE GRAND JURY PROCEEDING REGARDING COMPELLED TESTIMONY OF DAVID MERVIN HOFFMAN

ORDER IN RE CONTEMPT

This matter came on regularly for a hearing pursuant to this Court's previous order and pursuant to motion. The Court, first of all, finds the following facts:

1. David Mervin Hoffman was subpoenaed to appear and testify before the Great Falls Grand Jury of June 16, 1986, in Great Falls, Montana.

2. That Mr. Hoffman did not appear before the Grand Jury as his attorney, Charles Moses and the government attorney had discussions regarding request for immunity by Canada.

3. Mr. Hoffman was once again subpoenaed to

appear before the Great Falls Grand Jury on November 18, 1986.

4. Mr. Hoffman was served with a copy of his subpoena to testify before the Grand Jury.

5. Mr. Hoffman was given a copy of the Writ of Habeus ad Testificadum and was asked to testify.

6. Mr. Hoffman refused to testify and Mr. Hoffman was then given and read a copy of this Court's compulsion order requiring him to testify and granting him immunity from such matters that he would reveal.

7. Mr. Hoffman still refused to testify to questioning by the government and the Grand Jury.

8. Upon the request of the government on behalf of the Grand Jury, this court convened a hearing on the afternoon of November 18, 1986, an oral motion was made by the government to hold Hoffman in contempt and various documentation and arguments were presented at that time.

9. It was agreed by counsel for both parties that a briefing schedule would be set and a continuation of the hearing and renewed hearing would be set once again for December 17, 1986.

10. On behalf of Hoffman Charles Moses filed a motion and supporting memorandum dated November 24, 1986.

11. The government filed its brief in support of motion to hold in contempt together with a motion to hold in contempt on December 9, 1986, and on December 11, 1986, filed a Supplement to Brief in Support of Motion to Hold in Contempt.

12. That Mr. Hoffman's attorney filed a reply brief of David Mervin Hoffman on December 16, 1986.

13. This court held a hearing at 1:45 p.m. on December 17, 1986, at which time David Mervin Hoffman was present with counsel, and the government being represented.

14. David Mervin Hoffman was able to testify on his behalf.

15. This Court received various exhibits in this matter to which there was no objection by either of the parties.

16. The Court received the following documents as exhibits:

(a) Transcripts of proceedings of April 4, 1986;

(b) Transcript of procedings of May 9, 1986;
(c) Transcript of sworn testimony of David Mervin Hoffman, November 18, 1986;
(d) Copy of the Indictment;
(e) Handwritten note of Mr. Hoffman's previous attorney, Christopher Thimsen;
(f) Affidavit of Christopher P Thimsen, dated December 15, 1986;
(g) Copy of judgment and conviction;
(h) Letter from Jeffrey Thomas, Agent for the Attorney General of Canada, dated November 18, 1986;
(i) Copy of the habeus corpus ad testificadum, writ dated November 10, 1986;
(j) Copies of subpoena to testify before the Grand Jury dated November 18, 1986;
(k) Although not specifically received as evidence exhibit "D", attached to Government's Brief in Support of Motion to Hold in Contempt shall be considered by the court taking judicial notice which exhibit being an information charging David Mervin Hoffman under the name of Thomas Stanley Deane in a two count indictment dated January 13, 1986, in British Columbia, Canada.
(l) This Court's Compulsion Order, dated June 16, 1986.

Based upon the foregoing facts and consideration of the following evidence, the court makes the following conclusion:

1. Based upon United States v. Powers, 629 F.2d 619, this Court has pursuant to the motion before the powers to hold the defendant in criminal or civil contempt pursuant to section 42(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. 401 and/or 28 U.S.C.

1826.

2. Based upon David Mervin Hoffman's refusal to testify before the Grand Jury and his explanation of same before this Court, through counsel and through his own testimony, there is no just cause shown why he should not comply with the grand jury subpoena to testify nor this Court's Order of Compulsion, dated June 16, 1986.

3. That all of the matters set forth for reasons for not testifying including fear of retaliation is not just cause, the claim of conflict of interest or conflict of laws or lack of Fifth Amendment rights between the United States and Canada is not just cause.

4. The government has advised this court that it will not use the grand jury transcript for the purpose of providing it to Canadian authorities for prosecution of Mr. Hoffman in Canada.

5. Based upon United States v. Baird, 668 F.2d 432 (8th Cir.) cert. denied, 102 U.S. 2255 (1982), that Hoffman has expressed no rights or concerns within the framework of the grand jury testimony, compelled testimony or contempt case law that is appropriate.

APPENDIX B

6. The grand jury investigation, without knowing the full contents herein, is in fact reasonable under the facts and circumstances set forth although this court has sketchy knowledge at the time of hearing.

7. That the plea bargain agreement of Hoffman, set forth entirely upon the record, indicates that he was aware that any bargain reached between his counsel and the government was not binding upon the court.

8. The record indicates and counsel so stated that adequate briefing time, time for presentation of evidence and other matters to be presented to court prior to ruling have been adequate.

THEREFORE, IT IS ORDERED AS FOLLOWS:

1. That David Mervin Hoffman is found in contempt pursuant to Motion herein;

2. That David Mervin Hoffman shall be placed in the Cascade County Jail or such other suitable facility by the United States Marshal until such time as he can appear before the Great Falls Grand jury and give truthful testimony and answer such questions as may be propounded of him pursuant to such investigation;

3. In the event that David Mervin Hoffman fur-

ther refuses to testify at the next seating of the Grand Jury, he shall remain in the Cascade County Jail until such time that he will testify or until further order of this Court.

4. Any computation of time spent in custody pursuant to this order and its effect upon defendant's fifteen (15) year prison sentence shall be computated by the Bureau of Prisons.

January 26, 1987.

Paul G. Hatfield
UNITED STATES DISTRICT JUDGE

APPENDIX B

JAMES E. SEYKORA
Assistant U.S. Attorney
P. O. Box 1478
Billings, MT 59103
Telephone (406) 657-6101

FILED
Jan 22, 1986
Lou Aleksich, Clerk
By Judy A. Bishop
Deputy Clerk

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA)	
Plaintiff,	) CR 85-1-BLG-JFB
vs.	) 21 U.S.C. 841(a)(1), and 841(b)(B)
THOMAS DEANE,	) (15 yrs and/or
	) $125,000 fine)
Defendant	) special parole term: 3 years

INDICTMENT

THE GRAND JURY CHARGES:

That on or about the 16th day of January, 1986, in and/or near Billings, in the State and District of Montana, THOMAS DEANE, knowingly and intentionally did unlawfully possess with intent to distribute marijuana, a Schedule I controlled substance, in violation of 21 U.S.C. Section 841(a)(1).

A TRUE BILL.

Donn M. Bruggeman
FOREPERSON

BYRON H. DUNBAR
United States Attorney
District of Montana

APPENDIX C

(Handwritten note of Christopher P. Thimsen)

2-19-86

Seykora called - If Deane pleads guilty - No recommendation re sentence - but any time will be concurrent w/Canadian sentence.

If he wants to rat then, they may make a recommendation for less time.

C.P.T.

APPENDIX D

Charles F. Moses
MOSES LAW FIRM
P. O. Box 2533
Billings, MT 5930-2533
Telephone: (406) 248-7702
ATTORNEYS FOR DAVID MERVIN HOFFMAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

.....

IN RE: GRAND JURY PROCEEDINGS

.....

STATE OF MONTANA)
: ss.
County of Yellowstone)

CHRISTOPHER P. THIMSEN, being first duly sworn, upon his oath, deposes and says:

1. That he is an attorney at law and duly authorized to practice in the State Courts of the State of Montana and before the Federal Courts in the District of Montana. That in such capacity, he represented Thomas Deane, also known as David Hoffman, with respect to an indictment filed January 22, 1986, in which the said defendant was charged with the possession of marijuana with intent to distribute the same. To that charge the defendant entered a plea of not guilty.

During the course of his representation of Mr. Hoffman, negotiations were conducted with the United States Attorney's office with respect to a resolution of the case without trial.

2. That on February 19, 1986, he was advised by the United States Attorney's office that if Mr. Hoffman pleads guilty there would be no recommendation with respect to the sentence, but any time imposed will be concurrent with the Canadian sentence. Your affiant was also advised that if the client wants to "rat" or testify against others, then the government may make a recommendation for less time. That the note prepared by your affiant is attached to and made a part of this affidavit.

3. That thereafter, he conferred with the defendant and explained the options that were available to him with respect to an entry of plea and was informed that Mr. Hoffman rejected any consideration to testify against others that may result in a recommendation of less time, and advised your affiant that he would accept the option of pleading guilty without recommendation as to sentence and that any time would be concurrent with

the Canadian sentence. That at the time of entry of the plea and at the time of the sentence, the defendant David Hoffman knew and understood that he was pleading guilty to the charge in the indictment without recommendation and had rejected any offer to testify as to others which might or could result in less time.

4. Your affiant further states that Mr. Hoffman made it a condition of the sentence that neither the United States Attorney nor the Court would have any objection to his being returned to Canada, since he wished to return to Canada where he is a citizen and not have any further contact with the American authorities. His understanding was incorporated in the Judgment of Conviction.

Further your affiant saith not.

DATED this 15th day of December, 1986.

s/ Christopher P. Thimsen

Subscribed and sworn to before me on this 15th day of December, 1986.

s/ Sandi Atkinson
Notary Public for the State of Montana
Residing at Billings, Montana
My Commission expires 4/10/1987

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, Billings Division
Docketing No. 86-1-BLG-JFB

Filed and Entered in
Criminal Docket
May 12, 1986
Susan L. Nybo, Deputy

United States of America vs.

DAVID MERVIN HOFFMAN a/k/a THOMAS DEANE

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government Robert L. Zimmerman, AUSA the defendant appeared in person on this date May 9, 1986

With counsel CHRISTOPHER P. THIMSEN, Esq.

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea.

FINDING AND JUDGMENT

There being a finding/verdict of **GUILTY**

Defendant has been convicted as charged of the

offense(s) of possession with intent to distribute marihuana, a Schedule I controlled substance, in violation of 21 U.S.C. Sec. 841(a)(1).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representatibe for imprisonment for a period of fifteen (15) years, with a special parole term of three (3) years, pursuant to 21 U.S.C. Sec. 841(b)(B).

SPECIAL CONDITIONS OF PROBATION

The Court has been informed defendant may seek application to serve his sentence in Canada. Neither the Court nor the. United States has any objection therein. In the event application is successful, the Court notes the terms and conditions of defendant's parole would be subject to Canadian law.

The defendant shall pay Fifty ($50.00) dollars to the

Victim's Crime Fund pursuant to the Comprehensive Crime Control Act, 18 U.S.C. Sec. 3013.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

s/ James F. Battin, Chief Judge,
D.Mont. May 12, 1986

of guilty unless what you tell me factually makes you guilty of a crime against the United States?

THE DEFENDANT: Yes, sir.

THE COURT: Do you know what the maximum punishment is as provided by law for the offense with which you are charged?

THE DEFENDANT: Yes, sir.

THE COURT: What do you believe that to be?

THE DEFENDANT: Fifteen years and $125,000 fine.

THE COURT: In addition to that, there is a special three-year parole provision which would really add onto any sentence that I might impose upon you.

THE DEFENDANT: Yes, sir, I understand that.

THE COURT: And that does not then, as far as you are concerned, make any difference as to whether or not you want to enter a guilty plea?

THE DEFENDANT: No, sir.

THE COURT: What is your present age?

THE DEFENDANT: Thirty-nine, sir.

THE COURT: And has there been any plea bargaining in this case, Mr. Thimsen, with the U. S. Attorney's office?

MR. THIMSEN: Your Honor, the only plea bargain we have entered into is in exchange for the plea of guilty, the U. S. Attorney would not make any recommendation regarding sentencing, and that they will request a presentence report before commencing.

THE COURT: All right. Is that your understanding, Mr. Seykora?

MR. SEYKORA: That's correct. I think one additional matter, perhaps, in the event that Mr. Hoffman were to make application, if he were sentenced to prison in this case, to serve his time in a Canadian prison, the U. S. Attorney's office would not object to that, Mr. Hoffman going back to Canada to serve that time, Your Honor, in addition to what Mr. Thimsen has already indicated to the Court.

THE COURT: Is that your understanding, as well, Mr. Thimsen?

MR. THIMSEN: Yes, Your Honor. The understanding, or the hope is, that any time Canada would give would be concurrent with the sentence here. Of course, that would be up to them. At least that recommendation would be put on the record, or a notation of it at

least would be placed on the record.

THE COURT: Mr. Hoffman, are you a Canadian citizen?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you do understand that I am not bound by the plea bargain in any way?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, I can consider it. If I don't like what they are saying, I'm not bound to agree to what they have agreed to?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Has anybody promised you any leniency in the terms of what I might do in the event that you pleaded guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anybody made any threats against you in order to get you to plea guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you now or have you been in the immediate past under the influence of any drugs?

THE DEFENDANT: No, sir.

THE COURT: Have you had enough time to discuss

with Mr. Thimsen any possible defenses that you might have to the charge?

THE DEFENDANT: Yes, sir.

THE COURT: You have told him everything that you know about it?

THE DEFENDANT: Yes.

THE COURT: So he's prepared to advise you?

within the parameters of the court at this time, and this posture, to look at that. The record is clear as to what he understood. Now, if he's going to say the understanding was different, we are getting into an entirely different ball game.

THE COURT: I think you're probably right. I don't think he can impeach what actually occurred. It's my understanding here, that there was an offer made which he rejected but anyway, just so there is a complete record for an appeal here, I am going to overrule and you may go ahead.

MR. MOSES: Thank you.

Q. (By Mr. Moses) Would you explain what your understanding of the events were, in connection with your entry of a plea on May 9th, 1986?

A. I was told I had an option. I could testify against others and my sentence could be reduced. If I didn't want to testify against others, take my chances in court. I chose the latter and received the maximum sentence.

Q. Did you discuss this with your attorney, Mr. Thimsen?

A. Yes.

Q. Did you understand that you had those options?

A. Yes.

Q. And that you rejected, I take it, any testimony to be given against others to get less time?

A. Yes.

Q. Was that in your mind?

A. Yes.

Q. Was it your understanding that, by taking the second option, that you wouldn't have to testify against others?

A. Yes.

Q. Now with respect to the judgment of conviction, that is an exhibit in this particular case which has now been identified as the Defendant's Exhibit 4, there is some reference to, "the court nor the United States has any objection to your serving your sentence in Canada." Would you explain your understanding of that position and how it came about?

MR. SEYKORA: We would offer the same objection, calling for a conclusion of law on the part of the witness, your Honor. It's outside the scope of his

ability to answer.

THE COURT: Overruled. Go ahead.

Q. (By Mr. Moses) Would you explain that to the court?

A. To further — no hassles from the United States. And the rest of it, I have Mr. Thimsen get the judge to include on the order commitment that the United States or the court had anything more to do with me.

Q. Are you a Canadian citizen?

A. Yes, sir.

Q. Was there any objection by the judge, or the prosecutor, to you being returned to Canada?

A. No.

MR. SEYKORA: Objection. The record speaks for itself.

MR. MOSES: I'm sorry, the record does speak for itself.

Q. (By Mr. Moses) Now, there has been stated in the memorandum and the motion by the government, the request that if you are held in contempt, that that be considered as dead time. Do you resist and object to

that motion of the United States Attorney?

A. Yes, I do.

Q. Why do you do that?

A. My sentence began and can't be interrupted by a civil proceeding. Statute does not provide for exception. As my lawyer states, it isn't logical.

Q. You have discussed that with your attorney?

A. Yes, I did.

Q. And that's your position; right?

A. Yes.

Q. Finally, there has been some reference in the proceedings, and in your appearance before the Grand Jury, as to retalliation. I would like to know what your position is as to that. Can you explain to the court as to your fear of retalliation?

A. It is serious, I feel, because, once again, the effort to bring me in front of a Grand Jury has put me in severe danger, especially in a prison system, and I feel that the United States cannot protect me any longer.

MR. SEYKORA: I'm sorry, counsel, what was that response? Put you —

A. In severe danger.

Q. (By Mr. Moses) Would that be in the United States, as well as in Canada?

A. Yes, sir.

Q. You have had an opportunity, I take it, Mr. Hoffman, to go over all these matters and to discuss them with your counsel?

A. Yes, sir.

Q. You are, in some respects as to what the law is, relying on your counsel to advise you as to what you should or shouldn't do?

A. Yes.

MR. MOSES: Your Honor, I have no further questions for this witness.

THE COURT: Thank you. You may cross-examine.

MR. SEYKORA: Thank you, your Honor.

CROSS-EXAMINATION

EXAMINATION BY MR. SEYKORA:

Q. Mr. Moses asked you if you had another name besides David Hoffman, and I think you answered Thomas Deane. You had other names, too; didn't you?

THE COURT: Counsel?

MR. SEYKORA: Thank you, your Honor. Just a few moments.

Your Honor, the reason for the request for compelling testimony — Mr. Moses, at times, seems to lapse off in his brief into some great hypotheticals as to what may occur and what may not occur. We have been very forward with the court in what we wish to do and to have his testimony compelled.

Mr. Moses, apparently, is looking completely to the north and basically saying, and as he just said a few moments ago, he may have to testify in Canada again. Supposedly, the concern of Mr. Moses is that he's going to be subject to some type of criminal action, not that he just doesn't want to testify. I think those were the issues that are getting muddled a little bit with Mr. Moses.

Certainly, he may have to testify, but that doesn't subject him to any type of penalty. When the bottom line gets down to his argument, he doesn't want to snitch, or rat off on somebody else, and I can appreciate that and understand that, but that's the reason for compelling testimony there. In fact, one of the procedures that are being used currently in the court system — I just talked to another prosecutor that had seven defendants in a case. They asked to be severed. They were severed. They went to trial with a No. 1 defendant and they called the second and third defendant to testify against the first guy, compelled

no pleading or anything about the unconstitutionality of the statute, that they purportedly had the jurisdiction to hear it, and he found that he did not have jurisdiction to hear the writ of mandamus. But then as an aside, or sua sponte, said as a matter of fact — and by the way, just in case anybody is interested, the Congress didn't have the right to pass this statute that I say I now have jurisdiction under, because the constitution itself is specific on the point, they could not do it.

Anyway, my first impression was that you were probably right, but the Ninth Circuit has not held that way, and I think that I'm duty bound to follow this circuit case.

Then that brought me down to the point of the plea bargain and it's funny, as strange as this sounds, I think in the Canadian law that's cited here, their rationalization is kind of like you would think here in our use of the term. What is the work, they don't allow the prosecution because —

MR. SEYKORA: Abuse of process, your Honor.

THE COURT: Abuse of process. But in this situation, this defendant had an option, in a sense, but it was his option to either rat, if you want to use that word, and then he would get a lesser sentence. He chose not to do that, but that didn't bind and, of course, the U.S. Attorney could not bind the system, per se.

I just don't see that the plea bargain — he had an option to do that, he didn't choose to do it, so he's stuck

with what he's got.

Usually, when you get through with the due process, you're always going through that roller, and it seems the more process you use, the thinner you get by the time you're rolled out, and that probably isn't a good legal determination, but that's sometimes true.

Anyway, I feel here that that plea bargain does not apply here to what we are doing. First of all, he was given the opportunity to express, if there was anything there and, of course, by that time he had chosen not to. But somehow, in my mind, it isn't as though nobody told him. As far as I can see, if you don't take this option, then we are going to force you, or not force you; he wasn't promised that this procedure wouldn't be carried out.

Now I don't know how good a lawyer Mr. Thimsen is. I don't believe I ever met him, and maybe that has nothing to do with what we are talking about, but it might have been on his part at that point to make some sort of a record as to what we are talking about here now. I think it might have been possible, but I don't see how that arises. Just under the nature of the beast, I don't follow that logically out.

Therefore, we come down to the fact that I do find him in comtempt. I order him to testify, which brings us down to the last point and, that is, whether or not it is dead time. Are

28 U.S.C. Sec. 1826. Recalcitrant witness.

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of -

(1) the court proceeding, or

(2) the term of the grand jury, including extensions

before which such refusal to comply with the court order occurred, but in no event shall confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or to which he is confined pursuant to this section or section 4243 of title 18, or whoevere rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both.

18 U.S.C. Sec. 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

APPENDIX L

Supreme Court, U.S.
FILED
AUG 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1909

In the Supreme Court of the United States

OCTOBER TERM, 1987

DAVID MERVIN HOFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the terms of a pretrial agreement precluded the district court from directing petitioner to testify before a grand jury.

2. Whether petitioner may assert his Fifth Amendment privilege, despite a grant of use immunity, and refuse to testify before a federal grand jury on the theory that his testimony might eventually be used in a foreign prosecution.

3. Whether incarceration for civil contempt interrupts the running of the term of imprisonment petitioner is serving.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is unreported. The order of the district court (Pet. App. B) is also unreported.

JURISDICTION

The judgment of the court of appeals affirming the district court order holding petitioner in civil contempt was entered on February 27, 1987. The petition for a writ of certiorari was filed on May 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 26, 1987, the United States District Court for the District of Montana issued an order, pursuant to 28 U.S.C. 1826, holding petitioner in civil contempt for failing to testify before a grand jury and directing that he be incarcerated until he did so (Pet. App. B). The court of appeals affirmed (Pet. App. A).

1. On January 22, 1986, petitioner, a Canadian citizen, was indicted in the United States District Court for the District of Montana for possession of 8,500 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Pet. App. C). On April 4, 1986, petitioner appeared before the district court to enter a plea of guilty to the charge, pursuant to a pretrial agreement with the prosecutor. Addressing the plea agreement, the trial judge conducted the following inquiry (Pet. App. G):

> The Court: And has there been any plea bargaining in this case, Mr. Thimsen [the defense counsel], with the U.S. Attorney's Office?
>
> Mr. Thimsen: Your Honor, the only plea bargain we have entered into is in exchange for the plea of guilty, the U.S. Attorney would not make any recommendation regarding sentencing, and that they will request a presentence report before [sentencing].
>
> The Court: All right. Is that your understanding, Mr. Seykora [the prosecutor]?
>
> Mr. Seykora: That's correct. I think one additional matter, perhaps in the event that [petitioner] were to make application, if he were sentenced to prison in this case, to serve his time in a Canadian prison, the U.S. Attorney's of-

> fice would not object to that, [petitioner] going back to Canada to serve that time, Your Honor, in addition to what Mr. Thimsen has already indicated to the Court.
>
> The Court: Is that your understanding, as well, Mr. Thimsen?
>
> Mr. Thimsen: Yes, Your Honor. The understanding, or the hope is, that any time Canada would give would be concurrent with the sentence here. Of course, that would be up to them. At least that recommendation would be put on the record, or a notation of it at least would be placed on the record.

After accepting petitioner's guilty plea, the district court sentenced petitioner to 15 years' imprisonment and to a three-year special parole term. The court also recommended that petitioner be permitted to serve his sentence in a Canadian prison. Pet. App. F.

2. Thereafter, a grand jury in the District of Montana issued a writ of habeas corpus ad testificandum requiring petitioner to appear as a witness before it on June 16, 1986. Petitioner refused to appear on the ground that his testimony could incriminate him in a pending Canadian prosecution. The United States Attorney then contacted Canadian authorities and, on November 18, 1986, a representative of the Attorney General of Canada appeared before the district judge who was supervising the grand jury investigation. The Canadian official presented a letter to the court stating that the Dominion of Canada did not intend to use petitioner's testimony before the grand jury in any prosecution of petitioner in Canada. The Canadian official also explained that the immunity letter was binding on all provinces of Canada, because all narcotics violations in Canada

fall within the jurisdiction of federal prosecutors. The district court thereupon issued a compulsion order requiring petitioner to testify and granting him immunity from the use in a criminal prosecution of matters revealed in his testimony. Pet. App. B.

Despite the district court's immunity order, petitioner persisted in his refusal to testify. The government accordingly requested that he be held in contempt. During the proceedings on the motion to hold petitioner in contempt, petitioner's counsel introduced a handwritten note made by his former defense attorney during plea negotiations. The note indicated that in exchange for a plea of guilty, the prosecutor had offered to make no recommendation with respect to sentence and to seek a term concurrent with any imposed for a then pending Canadian prosecution for an unrelated offense; it also indicated that if, in addition, petitioner agreed to testify against others, the government would recommend leniency in sentencing (Pet. App. D). Petitioner testified in the contempt hearing that he understood that, under the plea agreement, he had an option: "[He] could testify against others and [his] sentence would be reduced. If [he] didn't want to testify against others, [he could] take [his] chances in court. [He] chose the latter and received the maximum sentence" (Pet. App. H).

Following the hearing, the district court issued an order, pursuant to 28 U.S.C. 1826, holding petitioner in civil contempt and directing that he be incarcerated in the local jail until he testified or until further order of the court (Pet. App. B.) The court noted that "the plea bargain agreement of [petitioner was] set forth entirely upon the record" and that there was no just cause shown why he should

not testify before the grand jury (*ibid.*). The court further noted that "[t]he government has advised the court that it will not use the grand jury transcript for the purpose of providing it to Canadian authorities for prosecution of [petitioner] in Canada" (*ibid.*).[1] The order left it to the Bureau of Prisons to determine how incarceration pursuant to the contempt order would affect the term of imprisonment petitioner was then serving (*ibid.*).

3. On appeal, petitioner maintained that the order directing him to testify was contrary to the terms of his plea bargain with the government; that the prospect of his being further prosecuted in Canada for offenses relating to the subject matter of his grand jury testimony precluded the court from ordering him to testify; and that his incarceration for civil contempt could not lawfully interrupt the running of his criminal sentence, which was imposed earlier. The court of appeals rejected each of those claims. It held (Pet. App. A) that the government never promised petitioner that he would not be subpoenaed to testify; that the possibility of the use of grand jury testimony by a foreign jurisdiction does not justify a witness in invoking his privilege against compulsory self-incrimination despite a court order of use immunity;[2] and that a civil contempt sentence im-

---

[1] At the hearing the court had directed that, in the event petitioner elected to testify, "[the] grand jury testimony is to be sealed. If it's transcribed, it's not to be released by [the prosecutor] to the Canadian government" (C.A. Supp. E.R. 40-41).

[2] In reaching this conclusion, the court relied on circuit precedent (*In re Federal Grand Jury Witness (Lemieux)*, 597 F.2d 1166, 1167 (9th Cir. 1979); *In re Weir*, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974)), holding that in light of the district court's power to preserve the

posed upon a person serving a term of imprisonment properly suspends the service of the criminal sentence during the period of the contemnor's confinement for the contempt.

ARGUMENT

1. Petitioner contends (Pet. 10-16) that the order directing him to appear and testify before the grand jury violated the terms of his plea agreement. This fact-specific claim was properly rejected by the court below. There is no need for further review by this Court.

As this Court explained in *Blackledge* v. *Allison*, 431 U.S. 63, 73-74 (1977), "representations of the defendant [and] his lawyer * * * at [a guilty plea] hearing * * * constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." In this case, during the Fed. R. Crim. P. 11 inquiry, petitioner's attorney represented to the court that the *only* promise the government made in exchange for petitioner's plea was its assurance that it would make no recommendation as to sentence and that it would recommend that petitioner be permitted to serve in Canada any sentence of confinement (Pet. App. G).

Representations made during the Rule 11 inquiry are "not invariably insurmountable," and in some cases "specific factual allegations" may entitle a defendant to an opportunity to show in a subsequent hearing that there were unrevealed promises made

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secrecy of grand jury testimony, there was no "real and substantial" danger of the foreign use of immunized grand jury testimony. See *Zicarelli* v. *New Jersey State Investigation Comm'n*, 406 U.S. 473, 478 (1972).

by the government in exchange for a plea of guilty. See *Blackledge*, 431 U.S. at 74-76. In this case, however, petitioner plainly failed to make the showing necessary to warrant an inquiry into the allegation that there was an unrevealed promise.[3] Although there was evidence that, during the plea bargaining process, the government had offered to seek leniency for petitioner if he agreed voluntarily to present testimony against others, it is undisputed that he elected not to do so. And, as the court of appeals recognized, nothing in the record suggests that, during the bargaining process, the government either promised petitioner that he would not be subpoenaed to testify in the event that he entered a plea of guilty, or that it made representations that could reasonably be understood as constituting such a promise. See, *e.g.*, *United States* v. *Kamer*, 781 F.2d 1380, 1387-1389 (9th Cir. 1986), cert. denied, No. 85-1923 (Oct. 6, 1986). Consequently, the plea agreement did not preclude the government from subpoenaing petitioner to testify during the grand jury proceeding.[4]

2. Petitioner also claims (Pet. 16-25) that, despite the grant of use immunity, his compelled testimony

---

[3] Petitioner was, of course, given the opportunity to establish his claims regarding the plea agreement at the contempt hearing.

[4] *Santobello* v. *New York*, 404 U.S. 257 (1971), upon which petitioner relies is, therefore, inapposite. In that case it was undisputed that the defendant and the prosecutor had struck a bargain involving the entry of a plea of guilty to a lesser offense in exchange for the prosecutor's promise not to make any recommendation on sentence. In this case, no agreement was ever struck whereby, in exchange for petitioner's plea and promise to testify, the government agreed not to subpoena him to testify before the grand jury. At most, the government merely offered to make such an agreement.

before the grand jury would violate his Fifth Amendment privilege against compulsory self-incrimination because that testimony might be given to the Canadian government for use against him in a criminal prosecution in that country. This claim was also properly rejected by the court below.

As this Court explained in *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972), it is unnecessary to address the question whether the Fifth Amendment protects against the risk of the use of compelled testimony against the witness in a foreign prosecution unless there is a "real and substantial fear" of such use in a foreign prosecution. This is because "[i]t is well established that the privilege protects against real dangers, not remote and speculative possibilities" (*ibid.*). See, *e.g.*, *United States* v. *(Under Seal)*, 794 F.2d 920, 923 (4th Cir. 1986), cert. denied *sub nom. Araneta* v. *United States*, No. 86-172 (Oct. 16, 1986) [hereinafter *Araneta*]; *In re Grand Jury Proceedings*, 748 F.2d 100, 103 (2d Cir. 1984).

In this case, petitioner did not run a real and substantial risk of a foreign prosecution in which his grand jury testimony would be used against him. In the first place, a representative of the Attorney General of Canada furnished written assurance to the court that petitioner's grand jury testimony would not be used in any prosecution of petitioner anywhere in that country.[5] Beyond this, during the contempt hearing the district court specifically directed that "no one ever * * * release" petitioner's grand jury testimony "to anyone" and, specifically, that the prosecutor not release it to the Canadian government

[5] In light of that letter, petitioner's apparent concerns about the district court's interference with Canadian sovereignty (Pet. 21-23) are without foundation.

(C.A. Supp. E.R. 40-41). These assurances minimized the risk that, should petitioner decide to testify, his testimony would later be used to incriminate him in a Canadian prosecution. See, *e.g.*, *In re Grand Jury Proceedings*, 748 F.2d at 103 (protective order issued by the district court sufficient to protect against foreign prosecution); *In re Baird*, 668 F.2d 432, 433 (8th Cir.), cert. denied, 456 U.S. 982 (1982) (secrecy afforded grand jury proceedings by Fed. R. Crim. P. 6(e) adequately assured that incriminating testimony would not be furnished to foreign officials); *In re Federal Grand Jury Witness (Lemieux)*, 597 F.2d 1166, 1167 (9th Cir. 1979) (same).[6]

---

[6] The decision of the court below and its earlier decision in *Lemieux*, *supra*, do not conflict with *Araneta*, *supra*, as petitioner maintains (Pet. 20). Both *Lemieux*, 597 F.2d at 1167, and *Araneta*, 794 F.2d at 923, hold that the proper framework for resolving the secrecy issue is the test articulated in *Zicarelli*, *supra*, *i.e.*, whether the witness confronts a real and substantial risk of foreign prosecution based on his immunized testimony. Although the court in *Araneta* concluded that the district court's protective order, issued pursuant to Fed. R. Crim. P. 6(e), was inadequate to obviate the risk of self-incrimination in a trial by a foreign state, it did so because of the unique circumstances of the case, which involved the former president of the Philippines, who was alleged to have illicitly obtained billions of dollars as a result of his activities in that country. The instant case does not possess the same notoriety. Moreover, by contrast with *Araneta*, petitioner was afforded written assurances by the foreign sovereign that his grand jury testimony would not be used against him in any foreign prosecution.

Although three Justices would have granted certiorari in *Araneta*, the court of appeals there concluded that there *was* a real and substantial risk of foreign prosecution and accordingly reached the question reserved in *Zicarelli*, *supra*. The court below, in contrast, concluded that there was *no* such risk (see note 2, *supra*); it accordingly did not consider

3. Finally, petitioner claims (Pet. 26-29) that the district court erred in directing that any incarceration resulting from his contempt citation would suspend service of the sentence on his earlier criminal conviction. More specifically, he maintains that such a suspension of the running of his term of confinement would contravene 18 U.S.C. 3568. That statute provides in pertinent part that

> [t]he sentence of imprisonment of any person shall commence to run from the date on which such person is received at the penitentiary * * * for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term 'offense' means any criminal offense * * *.
>
> * * * * *
>
> No sentence shall prescribe any other method of computing the term.

The district court did not, itself, direct that the contempt incarceration would toll the running of the sentence imposed on the earlier criminal conviction. Instead, it merely stated that the effect upon the sentence of the time spent in custody pursuant to the contempt order "shall be comput[ed] by the Bureau of Prisons" (Pet. App. B). Bureau of Prisons regulations provide that "[i]f an inmate is serving a federal criminal sentence when a civil contempt sentence is ordered, the criminal sentence is suspended

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the scope of the Fifth Amendment privilege in this context. For that reason, this case is a less attractive candidate for certiorari than *Araneta*.

for the duration of the civil contempt sentence and time spent serving the contempt sentence is inoperative on any sentence being served" (28 C.F.R. 522.11 (d); Bureau of Prisons Program Statement No. 5140.11 (1979)).

The Bureau of Prisons' policy does not conflict with 18 U.S.C. 3568. As the court explained in *Martin* v. *United States*, 517 F.2d 906, 909 (8th Cir.), cert. denied, 423 U.S. 856 (1975) (quoting *Anglin* v. *Johnson*, 504 F.2d 1165, 1167 (7th Cir. 1974), cert. denied, 420 U.S. 962 (1975)):

> "[t]he language of section 3568 is unambiguous. Credit shall be given for time spent 'in connection with the offense or acts for which sentence was imposed' and 'offense' is defined as a 'criminal offense.' The confinement for which petitioner seeks credit was imposed in connection with a civil contempt (refusal to testify) and not in connection with the criminal offense 'for which sentence was imposed.'" * * *
>
> [Accordingly,] interruption of the criminal sentence by a civil confinement pursuant to [28 U.S.C.] § 1826(a) is not in derogation of 18 U.S.C. § 3568 but arises from the clear and unambiguous provisions of that statute.

Adopting reasoning similar to that in *Martin*, *supra*, and *Anglin*, *supra*, six other courts of appeals have likewise held that a period of incarceration for civil contempt interrupts a criminal sentence currently being served, and no circuit has held otherwise. See, *e.g.*, *In re Application of the United States Sen. Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1239 & n. 33 (D.C. Cir.) (collecting cases), cert. denied, 454 U.S. 1084 (1981); *United States* v. *Dien*, 598 F.2d 743, 744-745 & n.1 (2d

Cir. 1979); *In re Garmon*, 572 F.2d 1373, 1375-1376 (9th Cir. 1978); *In re Grand Jury Investigation (Appeal of Hartzell)*, 542 F.2d 166, 168-169 (3d Cir. 1976), cert. denied, 429 U.S. 1047 (1977); *In re Grand Jury Proceedings*, 532 F.2d 410, 411-412 (5th Cir.), cert. denied, 429 U.S. 924 (1976); *Williamson* v. *Saxbe*, 513 F.2d 1309 (6th Cir. 1975). That uniform rule is entirely consistent with the policy underlying civil contempt proceedings against recalcitrant witnesses. If a civil contempt order did not interrupt a criminal sentence, it would have no coercive effect against a witness who was already serving a sentence on other charges. Review by this Court is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40462

Supreme Court, U.S.
FILED
AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

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REPLY BRIEF

. . . . . .

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INTRODUCTION

We have received the government's brief in opposition to the petition for writ of certiorari. Our impression is that it reflects an indifference to the "rights of man" as developed more than 200 years ago in our Constitution. Governmental domination or governmental authority seems to be the prevailing theme.

Furthermore, we seem to detect a certain assertion of insubstantiality of our claim. The government's brief finds no fundamental significance to that which we seek to present to the Court. May we respectfully suggest that it is all a matter of perspective.

The fair administration of justice, integrity of government, fair dealing and equal treatment under the law become the focal point of our presentation to the Court.

This reply brief seeks to point out the importance of this case and our argument follows:

1. THE PLEA BARGAIN

Central to this discussion are the principles set forth in the Ninth Circuit Court decision of February 27, 1987. There the Court held:

> "When a guilty plea rests in any significant degree upon a promise or agreement of the government, such promise must be fulfilled." See U.S. v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984).
>
> "In determining whether a plea agreement has been broken the Court must look to what was reasonably understood by the defendant when he entered his plea."

In other words, we must look at the circumstances that

are presented in an individual case to determine, from the defendant's perspective, whether there was a significant understanding or forebearance by the government in this case.

Let me recite two practical examples which delineate and demonstrate this issue in a common sense and logical manner. To repeat, it depends upon a person's perspective and that is what is important here.

1. The Crow Indian Tribe in Montana was placed on the Indian Reservation with the understanding that if they accepted this land within the exterior boundaries of the Reservation, it would be theirs forever and the government would forebear from taking any more land claimed by the government. Subsequently there was the ceded strip from the lands of the Crows for homesteaders and on other occasions, thereafter, land was simply taken from the Indians for government purposes until it reached its present size. Despite promises of forebearance, the government had the power and exercised the power to change the agreement or treaty between the parties despite the understanding or the inducement that the land would belong to the Indians forever. The Indian Claims Commission sought to remedy this situation by paying the Indians the value of the lands, subsequently taken, but at the date of the taking. It is granted that this was a sad state of affairs in the history of our government, but it represents the power of the federal government to exercise its sovereign authority regardless of Indian rights solemnly declared. No one can quarrel with this example.

2. In many cases in court a property settlement agree-

ment in a divorce case is entered into by the wife upon the condition that she will have custody of the minor children. She has the choice or option to take what the husband offers or face the pressure of an extended custody battle. She believes that the best interests of the children support such an agreement and the agreement is reached. Sixty days thereafter the husband applies to the court for a change of custody because the courts are open and everyone has access to the courts (and without any change in the conditions existing at the time of the agreement). He thus has the advantage of the reduced property settlement and the advantage of an extended custody battle started anew.

These are practical problems that confront lawyers not only in their daily practice but in dealing with the seven Indian Tribes in the State of Montana and the word, forebearance, is the critical factor. Even though the government has the power and agrees to forebear and not utilize that power, when this inducement is breached and the power is subsequently exercised, the government has the best of both worlds, without let or hinderance. This recitation raises the critical issues in this case for they are strikingly the same.

Let me approach our position with a new perspective but similar to that presented in the initial petition for writ of certiorari.

A. The Facts. This is not a case in which the facts are in dispute. The defendant has testified clearly and concisely in court as to his understanding of the plea negotiations and the options afforded to him. If you enter a plea you take your chances as to a maximum sen-

tence without recommendation by the government. (This is what he received.) The alternative was to testify against others (rat) and the prospect of a lesser sentence was available to him. Mr. Hoffman did not wish to testify against others and chose the former option and included a provision that he be permitted to serve his sentence in Canada. (He did not trust the U.S. government and this is a fair perspective in light of after events.)

The attorney for Mr. Hoffman has confirmed and corroborated this understanding of the plea negotiations. The attorney for the government who was the same for all these proceedings offered no denial. The Court recognized in its remarks and findings that these were the facts.

Accordingly, we have a situation here where there is no dispute and the evidence is simply without contradiction and overwhelming in Mr. Hoffman's favor.[1]

The government, however, seems to rely upon the inquiry conducted by the court at sentencing. (U.S. Br. p. 2) The trial judge at the contempt hearing also relied upon the fact that he did not have to accept the agreement between the parties. Obviously, once the second option had been accepted by Mr. Hoffman, the understanding of the government that they would forebear from calling him as a witness was not relevant to the inquiry. We are favored with an article in the Journal of

[1] It is not a case where there is a requirement of abuse of discretion as a standard of review because all of the facts found were undisputed.

American Adjudicature Society, December/January 1987, Vol. 70, #4, where there is an extensive analysis of judicial supervision of the guilty plea. That article points out the inappropriate questions asked by the court to determine whether there were any promises, threats or pressures other than the plea agreement that had been made. This was asked in only 32% of all cases. If the question had arisen in the instant case, then these issues would not have occurred. This, however, was not the defendant's fault. Accordingly, it is again appropriate to conclude that the factual circumstances here, the option, and the inducement are stark in their presentation, without any dispute.

B. The Law. With respect to the law, we simply assert that Santobello v. New York, 404 U.S. 251, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971) states the law that applies in this case. We do not believe that a judicial construction here is required and recite the following: The Supreme Court stated the problem with respect to the due accord given these protections for the people in the following way. In Spevack v. Klein, 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625, the Court said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be

> watchful for constitutional rights of the citizen, and against any stealthy encroachments thereon.' 116 U.S. at 635, 29 L.Ed.2d at 752."

The State of Montana has adopted a similar principle. In State ex rel. Bennett v. Bonner, 123 Mont. 414, 214 P.2d 747 (1950), the Court said:

> "It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be obsta principiis.' Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746. Obsta pricipiis, - resist the first beginnings. Do not let the tyranny of government get a start. 'In the question of power, then,' wrote Thomas Jefferson, 'let no more be heard of confidence in man, but bind him down from mischief by chains of the Constitution.'"

A most persuasive statement is contained in Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). This case, of course, established the Miranda rights which are well known, but even more significant, the Court made the following statement which places our criminal process in the proper perspective:

> "On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England. These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights. Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.'"

In conclusion, we simply point out that the Court should recognize the issue of integrity of government, the fair administration of justice, fair dealing and due process. It is after all the only protection Mr. Hoffman has and these principles should not be subverted or wasted away.

One last comment deserves consideration. Where the facts and the law favor Mr. Hoffman then any opinion by the Court is not based upon a judicial decision but is based upon a personal judgment that seeks to eliminate these principles by judicial construction. It was, after all, Mr. Hoffman's understanding as to the finality of the proceedings in the United States by entry of his plea. NO MAN UNDER THESE CIRCUMSTANCES WOULD ELECT TO SUBJECT HIMSELF TO THE MAXIMUM SENTENCE WHEN HE COULD BARGAIN FOR LESS "KNOWING THAT HE WOULD HAVE TO TESTIFY ANY WAY." Thus, the argument of the government is reduced to its obvious absurdity.

2. THE RECALCITRANT WITNESS

Again the focus of this reply brief is based upon a different perspective than presented in each of the foregoing briefs by the government and by Mr. Hoffman. **18 U.S.C. Sec. 1826** provides for contempt upon refusal to testify "without just cause". The question to be resolved is the application of that standard to the case at bar. In ordinary terms, we have a standard which determines whether a good reason or proper cause exists which justifies any witness from refusing to testify. Let me cite two examples.

(a) The plea bargain agreement between the govern-

ment and Mr. Hoffman represents not only a plausible but good reason to refuse to testify. He does not have to be right in all events but simply to set forth a basis for his refusal to testify. Good faith such as cases in search and seizure cases and United States v. Leon 104 S.Ct. 3405, 82 L.Ed.2d 677, demonstrate that law enforcement has good reason or good cause to search even though they do not have to ultimately prove the guilt of the defendant. The issue is not only debatable as to the plea negotiations but all of the events, which is undisputed, points only one way.

(b) The issue of compelled statements affecting foreign jurisdictions is likewise important here. The law is obviously unsettled and the fear is real and substantial as demonstrated by cited cases. An article in the December issue of Champion points out this substantial issue and is attached as an exhibit here. It states more clearly that this issue is not only significant but represents good cause to be concerned about the ultimate outcome of this case. We find, therefore, that Mr. Hoffman was justified in expressing his concerns and had good reason for his position. It was done in a responsible manner and on reliance of counsel.

The statute, however, and the perspective of the statute is changed from that of a determination of good cause to one of compelling witnesses' testimony for governmental convenience. It is not a focus upon a good reason not to testify, or advice of counsel, or the validity of his position at that time; it is simply compelling testimony by confinement without regard to an inquiry as to the basis for his refusal to do so.

The practical circumstances compel this change in focus. Even if a witness has the best of reasons why he should not testify at the time, the government can compel such testimony on pain of contempt and incarceration. Simply put, they need the witness. In this respect, the statute does not mean what it says and the law is subverted.

3. DEAD TIME

We spend only a moment on dead time under the statute. The government relies upon the Bureau of Prisons Program Statement 5140.11 (1979), 28 C.F.R. 522.11(d), citing cases. What we have here is not an allegation of the statute as it is written, but a practical construction that there would be "no pressure on the witness to testify if he was already serving a sentence". Admittedly this is a practical solution because the witness must be pressured into testifying despite the statute and this language. The Court was confronted with just such a situation in T.V.A. v. Hill, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 2279 (1978) (the snail darter case). The Court was confronted with the same problem in McNally v. United States, decided June 24, 1987, No. 86-234. See also United States v. Rojas-Contreras, 88 L.Ed.2d 537 and Federal Reserve Board v. Dimension Financial, 88 L.Ed.2d 691. If we can secure a result by adding to the language of the statute, by subtracting language from the statute, by reading a conclusion into the statute, then such rules of judicial construction which have been universally condemned now hold sway. It is judicial activism at its best. As the Court has often said, Congress has the duty and responsibility to change the

law if a change is needed and not by judicial legislation or administrative rule making.

CONCLUSION

1. There can be no other understanding under the facts and the law from Mr. Hoffman's perspective that he would not be required to testify. A different forum such as a grand jury was simply irrelevant. Government integrity and the fair administration of justice is implicated here.

2. The statute for a recalcitrant witness requires a showing of good cause or a sufficient reason at that time for refusing to testify. It cannot be subverted into a means to compel the witness to testify on pain of incarceration without regard to good cause. This too subverts the statute.

3. Finally, dead time is a creation of the judiciary and not by the legislative statute but by virtue of judicial construction not giving meaning to the statute and its terms (or by administrative rule).

We think these issues are significant.

Respectfully submitted this 14th day of August, 1987.

MOSES LAW FIRM

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FILING AND SERVICE VERIFICATION

STATE OF MONTANA)
: ss.
County of Yellowstone)

CHARLES F. MOSES, of legal age, being first duly sworn, on his oath, deposes and says that he is the attorney for appellant herein, and that he personally has deposited 40 copies of this reply brief in the United States Post Office in Billings, Montana, first class postage prepaid and affixed, and properly addressed to the Clerk of this Court, on the 14th day of August, 1987.

Affiant further states that this reply brief was at such time and place served by mail on the respondent United States of America by mailing three copies thereof to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and three copies threof to:

Byron H. Dunbar
United States Attorney
Federal Building
Billings, MT 59101
Attention James E. Seykora
Assistant U.S. Attorney

Charles F. Moses

Subscribed and sworn to before me this 14th day of August, 1987.

Charlotte L. Sucas
Notary Public for the State of Montana
Residing at Billings, Montana
My Commission expires ~~4/9/1988~~ 1-31-89

the CHAMPION
OFFICIAL JOURNAL OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
DECEMBER 1986 VOL. X, NO. 10

What do You do When a Client Tosses the Murder Weapon on Your Desk?

see page 5

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EDITOR'S NOTE

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BEHIND CLOSED DOORS

by David Rudolf and Thomas Maher

Thanks to Ferdinand and Imelda, the United States Supreme Court is now directly faced with the question whether the Fifth Amendment provides any protection from compelled statements that may incriminate the witness in a foreign country, but not in the United States. The Fourth Circuit ruled recently that members of the Marcos's family may not invoke the Fifth Amendment based solely upon a fear of foreign prosecution regardless of whether that fear is real and substantial (it is, as Fabian Ver recently learned), and a petition for a writ of certiorari is now pending. While the Supreme Court ponders whether the secret of Imelda's shoes warrants the protection of the Constitution, lower courts have been pondering the Supreme Court's ruling in *United States v. Mechanik*, ___ U.S. ___, 106 S Ct. 938 (1986), and the Tenth Circuit has decided that the Supremes did not mean what they said.

Fear of Foreign Prosecution

The question whether United States courts may force a witness to testify to matters that may incriminate the witness under foreign law has arisen with increasing frequency over the past few years. The increasing importance of the question stems from the "burgeoning business" of extraditing offenders to foreign countries, a practice that tripled between 1980 and 1984. Lauter, *There's No Place To Hide*, NATL L. J., November 26, 1984, at 1, 28. Despite the number of cases, there has been no clear resolution of the issue. The arrival of the Marcos clan, however, has provided an opportunity for the Supreme Court to address the issue in a clear fact situation.

The issue whether fear of foreign prosecution is sufficient basis for raising a Fifth Amendment claim was first presented to the Supreme Court in *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472 (1972). The Court, however, ducked the question after finding that Zicarelli had no "real and substantial" fear that testimony about his Cosa Nostra responsibilities in New Jersey would expose him to prosecution outside the United States.

After *Zicarelli*, most courts have assumed that the Fifth Amendment protects one threatened by prosecution in a foreign country. *See Mashuma v. United States*, 507 F.Supp. 131 (D. Alaska 1981) (Fifth Amendment protected Japanese sailors facing criminal charges in Japan for negligently grounding their ship in United States waters); *United States v. Trucis*, 89 F.R.D. 671 (E.D. Pa. 1981) (Fifth Amendment protects defendant from answering questions when government seeks to revoke naturalization based upon crimes in Latvia, thereby exposing defendant to possible foreign prosecution); *In re Cardassi*, 351 F.Supp. 1080 (D.Conn. 1972) (grand jury witness questioned about drug smuggling from Mexico protected by Fifth Amendment). Only the Tenth Circuit, in *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), *vacated as moot sub nom. Parker v. United States*, 397 U.S. 96 (1970), held that the Fifth Amendment did not protect against compelled testimony concerning "acts made criminal by the law of a foreign nation." The strength of even this holding, however, was considerably undermined by the court's conclusion that the witness had no real fear that her testimony would be used against her in a foreign prosecution. The Tenth Circuit now seems to align itself with the circuits that offer protection if the fear of foreign prosecution is real. *In re Grand Jury Proceeding 82-2 (Nigro)*, 705 F.2d 1224 (10th Cir. 1982).

The focus of most litigation concerning a witness's refusal to testify because of a fear of foreign prosecution has therefore been whether the witness has a real and substantial fear that the testimony can and will be used by foreign prosecutors. This question turns upon two factors: the likelihood that the witness would be prosecuted in another country, and the likelihood that the compelled testimony would be used against the witness by the foreign prosecutors.

The analysis of the first factor has depended upon the court's view of foreign law. *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116 (2d Cir. 1982) (Fifth Amendment claim denied as Great Britain unlikely to prosecute for IRA activity in the United States), and the court's assessment of the level of interest a foreign prosecutor would have in the case. *In re Gilboe*, 699 F.2d 71 (2d Cir. 1983).

Analysis of the second factor has focused on the adequacy of protection against leaks to foreign countries offered by Rule 6 of the Federal Rules of Criminal Procedure and individualized protective orders fashioned by the courts. Most courts have been content with the level of protection offered by Rule 6(e)'s secrecy provisions. *See In re Baker*, 680 F.2d 721 (11th Cir. 1982) (per curiam); *In re Baird*, 668 F.2d 432 (8th Cir.), *cert. denied*, 456 U.S. 982 (1982). The confidence, however, has not been universal. In *Flanagan* the court examined the exceptions to non-disclosure under rule 6, the widespread incidence of grand jury leaks, and the number of situations in which litigants can obtain grand jury testimony, and determined that Rule 6(e) was not sufficient protection. Similarly, in *Cardassi*, the court was unwilling to assume that all law enforcement officials would abide by Rule 6(e).

Against this background the Fourth Circuit recently addressed the claims of Irene and Gregorio Araneta, daughter and son-in-law of Ferdinand Marcos in *United*

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States v. (Under Seal), 794 F.2d 920 (4th Cir. 1986). The Aranetas arrived in the United States with the ex-president of the Philippines (and a plane load of valuables). The Aranetas were allowed to enter the country under advanced parole status pursuant to 8 U.S.C. § 1182(d)(5), which allows the Attorney General to return them to the Philippines if he determines that their presence no longer serves the public interest. After their arrival in the United States, the Solicitor General of the Philippines filed charges against the Aranetas, alleging that they had violated the Anti-Graft and Corrupt Practices Act and Articles 210-221 of the Philippines Penal Code. The Aranetas then received more bad news in the form of grand jury subpoenas requesting that they appear before a grand jury in the Eastern District of Virginia that was investigating corruption in arms contracts with the Philippines. The district court granted the government's motion for statutory immunity, and ordered the Aranetas to testify. They refused to do so, claiming that their testimony could be used against them in the Philippines. The district court rejected this claim and found the Aranetas in contempt.

The Fourth Circuit had no problem in finding that the Aranetas had a real and substantial fear that their grand jury testimony could be used against them in the Philippines. The United States and the Philippines were co-operating in the investigation of corruption in the Marcos regime, and the Attorney General had the power to return the Aranetas to the Philippines, where they had already been charged with criminal offenses. In addition, it was clear that the Aranetas' grand jury testimony would be relevant to the charges against them in the Philippines. Despite a detailed and strict order from the district court controlling the disclosure of the Aranetas' testimony, the Fourth Circuit was unwilling to assume that their testimony would not end up in the possession of Philippine prosecutors. The court noted that the government retained the option of petitioning for a court order allowing disclosure, and that inadvertent disclosure of the substance of the Aranetas' testimony was a real possibility.

The court then faced the constitutional issue, and determined that the Fifth Amendment offered no protection when the witness's only fear was that the compelled testimony would incriminate them in a foreign country. The court recognized that the Supreme Court had never directly resolved this issue, and relied instead upon the Supreme Court's line of decisions that eventually extended the Fifth Amendment's protection to testimony in a federal prosecution that would incriminate the witness under state law. Under the older cases holding that the Fifth Amendment applied only to the federal government, the privilege against self-incrimination had been held not to prevent the United States from compelling testimony that might incriminate the witness in a state prosecution. *United States v. Murdock*, 284 U.S. 141 (1931). Only when the privilege against compelled self-incrimination was applied to the states, *Knapp v. Schweitzer*, 357 U.S. 371 (1958), did the Supreme Court prevent federal prosecutors from extracting testimony that could be used by the state. *Murphy v. Waterfront Commission*, 378 U.S. 1594 (1964). The Fourth Circuit, relying on these cases, reasoned:

> From this history, we conclude that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination. . . . Since the Fifth Amendment would not prohibit the use of compelled incriminating testimony in a Philippines court, it affords an immunized witness no privilege not to testify before a federal grand jury on the ground that his testimony will incriminate him under Philippine law.

794 F.2d at 926.

The court observed that the Fifth Amendment serves two purposes: it preserves the adversarial nature of our system of justice, and it protects those accused of crime from "the moral hazards of self-incrimination, perjury, or contempt." *Id.* As to the goal of preserving our system of justice, the court believed that it would not be affected by the use of compelled testimony by a foreign government. As to the second, the witness still faced the choice of self-incrimination, perjury, or contempt, but the United States had done everything within its power to prevent this. The court, then, believed that rejection of the Aranetas' claim in no way undermined the purposes of the Fifth Amendment. The court specifically limited its holding, however, to cases in which the United States has not "inspired, instigated or controlled" the foreign prosecution, and in which the United States pursues the immunized testimony for legitimate purposes of its own.

The Fourth Circuit is unlikely to have the last word on this matter. Over the summer, then Chief Justice Burger granted the Aranetas a stay pending the Supreme Court's consideration of their petition for a writ of certiorari. Burger concluded that it was likely that certiorari would be granted,[1] as the Court had previously granted certiorari on the same issue in *Zicarelli* and then failed to resolve the issue. Burger also believed that, based upon dictum in *Murphy v. Waterfront Commission*, there was a fair possibility that the Supreme Court would reverse the Fourth Circuit. *Araneta v. United States*, (United States, July 19, 1986), reported in 39 CRIM. L. REP BNA 4109.

Based upon the pending certiorari petition in *Araneta*, Justice Stevens granted a stay in a similar case arising out of the Seventh Circuit. *Mikutaitis v. United States*, 40 CRIM L. REP 4002 (Sept. 17, 1986). In *Mikutaitis* the witness had refused to testify at a civil deposition in a denaturalization proceeding in which the government sought testimony concerning his cooperation with the Nazi government. The Seventh Circuit found that the district court's order sealing the deposition testimony was sufficient protection, and did not reach the question whether the Fifth Amendment offered any protection. Justice Stevens found that whether a sealing order was sufficient protection was an open question that would likely be reviewed by the full court.

Should the Fourth Circuit's view prevail, some interesting issues remain for counsel representing a witness who legitimately

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1. Time has shown Justice Burger to be a poor prophet. On October 20, 1986, after this column was written, the Supreme Court denied the petition for a writ of certiorari. *Araneta v. United States*, 86-172 (United States Oct. 20, 1986). Counsel must now deal with the Fourth Circuit's opinion as the last word for now.

fears that his testimony will be used by a foreign government. Under the Fourth Circuit's analysis, the application of the Fifth Amendment depends upon whether both sovereigns are under the same obligation not to coerce incriminating testimony. In the case of federal and state prosecutors this is clearly true. The Fourth Circuit did not address the question whether the same result applies when the foreign prosecutor also operates under a similar constraint imposed by that country's constitution or other law. The court implies that it will not, and that the federal prosecutor will only be restrained when the second sovereign is subject to the United States Constitution, which a foreign government never is. The court, however, did not directly deal with what affect, if any, a foreign government's own protection against compelled incrimination would have. The second issue that remains, of course, is to what degree the United States can be involved in the foreign prosecution before it can be said to have "inspired, instigated, or controlled" that prosecution. In the case of many international crimes, such as drug smuggling, there may be a fair amount of cooperation between the United States and the foreign government, which should be open to discovery in support of a motion to quash a grand jury subpoena.